

Before the  
**Federal Communications Commission**  
Washington, DC 20554

In the Matter of

Office of Engineering and Technology  
Seeks Comment on Petition from Continental  
Airlines for Declaratory Ruling Regarding Whether  
Certain Restrictions on Antenna Installation are  
Permissible Under the Commission's  
Over-the-Air Reception Devices (OTARD) Rules

ET Docket No. 05-247

**COMMENTS OF CONTINENTAL AIRLINES, INC.**

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Pursuant to sections 1.415 and 1.419 of the Commission's rules, Continental Airlines, Inc. ("Continental"), by its attorneys, hereby respectfully submits the following comments in support of its *Petition* and *Supplement to Petition for Declaratory Ruling* (collectively, the "Petition"), which were placed on Public Notice by the Commission on July 29, 2005 in the above-captioned proceeding.<sup>1</sup> In its Petition, Continental seeks a determination that the Massachusetts Port Authority's ("Massport") demand that Continental remove an antenna used for the reception and transmission of fixed wireless signals in its Presidents Club ("Club") frequent flyer lounge at Boston-Logan International Airport ("Logan Airport") contravenes the Over-the-Air Reception Devices ("OTARD") rules and is prohibited.

**I. INTRODUCTION AND SUMMARY**

Continental is one of the major carriers in the United States and the world's sixth-largest airline. With 42,000 employees, Continental has hubs serving New York/Newark, Houston,

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<sup>1</sup> *OET Seeks Comment on Petition from Continental Airlines for Declaratory Ruling Regarding Whether Certain Restrictions on Antenna Installation are Permissible under the Commission's Over-the-Air Reception Devices (OTARD) Rules*, ET Docket No. 05-247, Public Notice, DA 05-2213, 2005 FCC Lexis 4373 (rel. July 29, 2005).

Cleveland and Guam, and together with its regional carrier Continental Express, carries approximately 56 million passengers per year.

In July 2004, Continental installed a fixed wireless antenna to create a Wi-Fi hotspot for Internet access within the premises of its Club at Logan Airport.<sup>2</sup> The antenna is used to provide free Internet access to Club members. The wireless service is also used by Continental employees who are allowed access to the Club when traveling on or conducting company business. By letter dated June 10, 2005, Massport demanded that Continental remove the antenna alleging that installation and operation of the antenna was prohibited by certain provisions in the lease agreement between Massport and Continental.<sup>3</sup> On June 23, 2005, Continental replied that it did not believe that the terms of the lease prohibited it from installing, maintaining and using the antenna.<sup>4</sup> Furthermore, Continental contended that even if Massport was correct in its assertion that lease provisions prohibited it from installing, maintaining and using the antenna, such lease provisions were preempted by the OTARD rules. On July 5, 2005, Massport replied that the lease did not violate any portion of the OTARD rules, “even assuming that the [FCC] Regulations are lawful (which Massport does not concede).”<sup>5</sup> Massport later stated in correspondence to Continental that the OTARD rules were inapplicable because Massport’s actions fall within the central antenna and safety exceptions to the rules. Massport

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<sup>2</sup> Wi-Fi hotspots are wireless local area networks comprised of unlicensed IEEE 802.11 devices and constitute one of the principal ways in which unlicensed devices are used to provide access to broadband services.

<sup>3</sup> See Letter from Gregory S. Zanni, Manager, Airport Properties, Massachusetts Port Authority, to Timothy J. Snow, Senior Manager, Corporate Real Estate, Continental Airlines, Inc., dated June 10, 2005 (attached as Exhibit A to Continental’s Petition) (*June 10, 2005 Letter*).

<sup>4</sup> See Letter from Donna J. Katos, Managing Attorney – Litigation & Dept. Admin., Continental Airlines, Inc., to Gregory S. Zanni, Manager, Airport Properties, Massachusetts Port Authority, dated June 23, 2005 (attached as Exhibit B to Continental’s Petition) (*June 23, 2005 Letter*).

<sup>5</sup> See Letter from Deborah Lau Kee, Associate Deputy Chief Legal Counsel, Massachusetts Port Authority, to Donna J. Katos, Managing Attorney – Litigation & Dept. Admin., Continental Airlines, Inc., dated July 5, 2005 (attached as Exhibit C to Continental’s Petition) (*July 5, 2005 Letter*).

stated that if Continental wished to provide wireless Internet access to its Club customers, it must do so using a central antenna maintained by a third party vendor. Finally, Massport renewed its demand for removal of the antenna by July 9, 2005 and stated that if Continental failed to comply with its demand, Massport would take all necessary steps to have the antenna removed. On July 7, 2005, and pursuant to sections 1.2 and 1.4000(e) of the Commission's rules,<sup>6</sup> Continental filed a Petition asking the Commission to declare that Massport's demand for removal of the antenna is prohibited and preempted by the OTARD rules.<sup>7</sup>

If the Commission lets Massport's restrictions stand, Continental will not be able to provide free wireless Internet access to Club members and its employees by installing and maintaining its own wireless Wi-Fi antenna. Instead, Continental will have to provide wireless Internet access using a provider of Massport's choosing on terms and conditions established by Massport and that provider. Other airport tenants will be similarly impaired. Such result would thwart competition among service providers, and Continental would lose the flexibility to responsibly and safely deploy wireless solutions at Logan Airport for the benefit of the flying public and its own best interests. Massport's proposal that Continental and other tenants at Logan Airport use a central antenna violates the OTARD rules and the Commission's Policy Statement on the open and interconnected nature of the Internet ("Policy Statement").<sup>8</sup> Furthermore, Massport's restrictions on the use of individual antennas do not come within either the central antenna exception or the safety exception to the OTARD rules. Accordingly, the Commission should grant Continental's Petition.

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<sup>6</sup> 47 C.F.R. §§ 1.2 and 1.4000(e).

<sup>7</sup> Petition of Continental Airlines, Inc. for a Declaratory Ruling filed July 7, 2005; supplemented July 19, 2005.

<sup>8</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (rel. Sept. 23, 2005) (Policy Statement).

## **II. MASSPORT’S LEASE RESTRICTIONS THAT PROHIBIT CONTINENTAL’S ABILITY TO INSTALL, MAINTAIN AND USE ITS OWN WIRELESS ANTENNA VIOLATE THE OTARD RULES AND THE COMMISSION’S POLICY STATEMENT ON THE OPEN AND INTERCONNECTED NATURE OF THE INTERNET**

The OTARD rules prohibit governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the-air reception devices.<sup>9</sup> The rules were enacted pursuant to Section 207 of the 1996 Act, which required the Commission to “promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.”<sup>10</sup> In November 1998, the Commission expanded the OTARD rules to apply to devices on rental property that is within the exclusive use or control of the tenant who has a leasehold interest in the property.<sup>11</sup> In October 2000, the Commission further amended the rules so that they also apply to customer-end antennas that receive and transmit fixed wireless signals.<sup>12</sup>

The OTARD rules apply, but are not limited to, state or local laws or regulations, including zoning, land-use, or building regulations, or private covenants, contract provisions, lease restrictions, homeowners’ association rules, or similar restrictions on property within the exclusive use or control of the antenna user where the user has an ownership or leasehold interest

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<sup>9</sup> 47 C.F.R. § 1.4000(a).

<sup>10</sup> *Implementation of Section 207 of the Telecommunications Act of 1996*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, 19277 (1996) (“*Report and Order*”).

<sup>11</sup> *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, FCC 98-273, Second Report and Order, 13 FCC Rcd 23874 (1998) (“*Second Report and Order*”), *aff’d*, *Building Owners and Managers Association et al. v. FCC*, 254 F.3d 89 (D.C. Cir. 2001).

<sup>12</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order in WT Docket No. 99-217, the Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and the Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983 ¶ 2 (2000) (“*Competitive Networks Order*”).

in the property. A restriction “impairs” if it: (1) unreasonably delays or prevents installation, maintenance, or use; (2) unreasonably increases the cost of installation, maintenance, or use; or (3) precludes a person from receiving or transmitting an acceptable quality signal from an antenna covered by the rule.<sup>13</sup>

Massport is in violation of the OTARD rules because of the following facts, none of which Massport disputes. First, Massport’s lease provisions on which it relies in demanding the removal of Continental’s antenna clearly and unambiguously impose a restriction that impairs the installation, maintenance, or use of such an antenna.<sup>14</sup> Second, the antenna is located on property that is within the exclusive use or control of Continental pursuant to a leasehold interest. Third, the antenna is used to receive or transmit fixed wireless signals.<sup>15</sup> Fourth, Continental’s antenna is one meter or less in diameter or diagonal measurement, thus complying with the measurement requirements of the OTARD rules. In addition, as shown below, Massport’s restriction violates the Commission’s Policy Statement on the open and interconnected nature of the Internet.

**A. Massport’s restrictions violate the OTARD rules because they unreasonably delay or prevent installation, maintenance and use of Continental’s antenna.**

As noted above, a lease restricting the use of individual antennas is in violation of the OTARD rules if it unreasonably delays or prevents installation, maintenance or use of an

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<sup>13</sup> 47 C.F.R. § 1.4000(a)(3)(i)-(iii).

<sup>14</sup> *June 10, 2005 Letter* (“Please be advised that Continental must remove its unauthorized antenna by July 9, 2005”); *July 5, 2005 Letter* at p. 3 (“As requested in the letter to Continental dated June 10, 2005, please have the unauthorized antenna removed by July 9, 2005”).

<sup>15</sup> The Commission has specifically reaffirmed that the consumer protections for the installation and use of consumer antennas under the OTARD rules apply to unlicensed devices, such as the antenna used to create a wireless Wi-Fi hotspot for Internet access at the Club. *Commission Staff Clarifies FCC’s Role Regarding Radio Interference Matters and Its Rules Governing Customer Antennas and Other Unlicensed Equipment*, Public Notice, DA 04-1844, 19 FCC Rcd 11300 (OET 2004).

antenna. In this case, Massport is seeking to impose a requirement under its lease that Continental seek approval prior to the installation of any fixed wireless antenna. Approval is obtained by filing a Tenant Alteration Application (TAA) form that, under the terms of the lease, Massport may deny at its sole and absolute discretion.<sup>16</sup> This requirement gives Massport complete discretion to prevent the use of the antenna altogether for absolutely no reason. It is well settled Commission precedent that a prior approval requirement constitutes an unreasonable delay and is therefore impermissible unless it is necessary for bona fide safety or historic preservation considerations.<sup>17</sup> Massport has not argued that the TAA procedure is necessary for historic preservation considerations and, as discussed in Section IV, *infra*, has not demonstrated that the safety exception to the OTARD rules apply. Moreover, the TAA procedure thwarts the Congressional directive in Section 706 of the 1996 Act to “encourage the deployment on a *reasonable and timely basis* of advanced telecommunications capability to all Americans” because it not only delays installation, but also could arbitrarily and capriciously prevent it altogether.<sup>18</sup> A restriction such as Massport’s, which it seeks to enforce either before, or after installation of the antenna as in the instant manner, creates an extra hurdle for Continental to overcome and impairs antenna use in violation of the Commission’s OTARD rules and the Policy Statement.

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<sup>16</sup> Sections 7.2, 9.4 and 9.8 of the lease agreement between Massport and Continental indicate that the TAA process entails, among other things, submission of a “complete application,” “in form satisfactory to the Authority.” Furthermore, approval may be “withheld, granted or conditioned” at Massport’s sole discretion and the approval must be in writing. See Supplement to Continental’s Petition at pp. 3-5.

<sup>17</sup> See *In re Philip Wojcikewicz*, DA 03-2971, Memorandum Opinion and Order, 18 FCC Rcd 19523, 19527-28 ¶ 12 (MB 2003); *In re Star Lambert and Satellite Broadcasting and Communications Ass’n of America*, CSR 4913-O, Memorandum Opinion and Order, 12 FCC Rcd 10455, 10464-65 ¶¶ 22-24 (CSB 1997) (“*Star Lambert*”); *Report and Order*, 11 FCC Rcd at 19286 ¶ 17.

<sup>18</sup> *Competitive Networks Order*, 15 FCC Rcd at 23030 ¶ 103 (emphasis added).



**B. Massport's restrictions violate the OTARD rules because they unreasonably increase the cost of installation, maintenance and use of Continental's antenna.**

As noted above, a lease provision restricting the use of an individual antenna is in violation of the OTARD rules if it unreasonably increases the cost of installation, maintenance or use of that antenna. According to Massport, the entity that operates the Massport-sanctioned central antenna, Advanced Wireless Group, LLC ("AWG"), "...has a very reasonable rate structure for airline use based on the number of enplanements at Logan Airport or on the number of 'hits.'"<sup>19</sup> Massport has not provided Continental with specific information regarding what rates would apply, how they would be calculated, or whether AWG would look to Continental or Continental's customers for payment. As demonstrated below, either basis for computing charges (number of enplanements or number of "hits") suggested by Massport will result in an unreasonable increase in cost.

If costs were computed using the number of enplanements (defined as revenue passengers boarding an airplane), Continental has an estimated average of 1,355 enplanements *per day* at Logan Airport.<sup>20</sup> Even if AWG were to charge a rather low rate per revenue passengers boarding an airplane, say \$0.05 per passenger, that would represent \$67.75 in charges per day, or \$24,728 per year.

If costs were computed using the number of "hits," Continental has an estimated average of 32 customers per day who are connecting to the wireless service offered at the Club. While Massport has not indicated what rate AWG would charge Continental per "hit," AWG's currently charges \$7.95 for Internet access at Logan Airport for a 24-hour period (hourly rates

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<sup>19</sup> July 5, 2005 Letter at p. 2.

<sup>20</sup> Continental Petition, Affidavit of Robert Edwards.

are not available). Using the current \$7.95 rate and current average number of customers would equal a charge of \$254.40 per day, or \$92,856 per year.<sup>21</sup>

Continental currently incurs a minimal monthly fee of approximately \$600 to support the free wireless service to its customers. Thus, the costs associated with using AWG will unnecessarily and unreasonably be greater to Continental and its customers in violation of the OATRD rules and the Policy Statement. Furthermore, the Commission has held that “both fees imposed directly by a restricting entity and costs imposed indirectly as a result of an entity’s requirements or restrictions can impose an unreasonable expense.”<sup>22</sup> Although Massport is not requiring payment to itself in exchange for an antenna in the Club premises, it is requiring Continental to purchase service from Massport’s service provider in order to provide wireless Internet service to Club customers. Thus, Continental is indirectly being required to pay Massport in order to maintain and use an antenna, which constitutes an unreasonable expense prohibited by the OTARD rules.

**C. Even if Massport offered to provide Continental with access to Logan’s wireless system free-of-charge, Continental would be impaired for purposes of the OTARD rules.**

After the filing of the Petition with the Commission, Massport informally suggested to Continental that it would be willing to provide Continental with access to Logan Airport’s wireless system, free-of-charge, for the duration of the lease agreement ostensibly in exchange for the withdrawal of Continental’s Petition. Therefore, there would be no increase in cost to Continental associated with the use of a central antenna. However, even if Continental had free

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<sup>21</sup> See *Star Lambert*, 12 FCC Rcd at 10465 ¶ 24 (holding that it is irrelevant whether an application procedure is simple or whether a \$5.00 application fee is a small fee because it “subjects the user to delay and expense without reason”).

<sup>22</sup> See *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, FCC 98-214, Order on Reconsideration, 13 FCC Rcd 18962, 18990 ¶ 65 (1998) (“*Order on Reconsideration*”).

access to Logan Airport's wireless system, Continental would still be impaired under the OTARD rules and the Policy Statement because: (1) Continental would not have the ability to install, maintain, or use an antenna covered by the OTARD rules on property within its exclusive use or control in which it has a leasehold interest; (2) Continental would not be able to select a service provider of its choice contrary to the Commission's rules and Policy Statement that allow consumers the ability to access the service provider of their choice;<sup>23</sup> (3) Continental would not be able to control the terms or quality of the service, which could potentially have a negative impact on Continental's service and goodwill with its most loyal customers; (4) Continental would be forced to accept the Massport-selected service provider's offering rather than its own; and (5) Continental may in fact find that the cost of this "free" service is passed on to Continental indirectly through other charges imposed by Massport. Moreover, once the current lease expires, Continental will be faced with the same issues that it faces today as to the uncertain future costs of Massport's central antenna.

**D. Massport's restrictions violate the Commission's Policy Statement regarding the open and interconnected nature of public Internet.**

Massport's restrictions are also contrary to the principles recently adopted by the Commission to encourage broadband deployment and to preserve and promote the open and interconnected nature of public Internet. These principles are: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) *consumers are*

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<sup>23</sup> See *Second Report and Order*, 13 FCC Rcd at 23886 ¶ 24; *Policy Statement* ¶ 4.

*entitled to competition among network providers, application, service and content providers.*<sup>24</sup>

These principles are consistent with the Commission's long-standing efforts to create an environment that encourages competition and investment in wireless broadband services using unlicensed devices.<sup>25</sup> Massport's restrictions are in direct conflict with these goals because they would prevent Continental, and every other tenant at Logan Airport, from selecting the service provider of their choice, with the quality of service that they seek, at the rates they deem reasonable, and with the functions and applications that they believe best serve their customers' needs.

### **III. MASSPORT'S RESTRICTIONS DO NOT FALL WITHIN THE CENTRAL ANTENNA EXCEPTION TO THE OTARD RULES.**

As noted above, Massport has taken the position that if Continental wishes to provide wireless Internet access to its Club customers, it must do so using Logan Airport's existing Wi-Fi backbone that uses a central antenna system installed and operated by AWG.<sup>26</sup> Also as noted above, Massport believes its restriction on the use of Wi-Fi systems (other than the central antenna system it has provided) falls within the central antenna exception to the OTARD rules. Continental disagrees because use of Massport's central antenna will unreasonably increase Continental's costs to provide wireless Internet access, and even if the service was offered to

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<sup>24</sup> See *Policy Statement* ¶ 4 (emphasis added). While policy statements do not establish rules, "they reflect core beliefs that each member of this Commission holds regarding how broadband Internet access should function." *Comments of Chairman Kevin J. Martin on Commission Policy Statement*, released August 5, 2005.

<sup>25</sup> See *Report by The Wireless Broadband Access Task Force*, GN Docket No. 04-163 (Feb. 2005) ("*Task Force Report*") (outlining the Commission's steps to facilitate the deployment of broadband wireless services through initiatives that aim to increase the availability of spectrum, allow maximum technical and regulatory flexibility for entities seeking to provide wireless broadband, and facilitate the development of the wireless broadband infrastructure by providing more regulatory certainty and removing regulatory disincentives).

<sup>26</sup> *July 5, 2005 Letter* at p. 1 ("a landlord is entitled to require tenants that wish to use fixed wireless services to make use of a central antenna, and thus, to bar tenants from installing and operating their own antennas").

Continental for free, it would prevent Continental from selecting the service provider of its choice. Therefore, the central antenna exception is not available to Massport.

The Commission has stated that the availability of a central antenna will generally be permissible provided that all of the following are present: (1) the person receives the particular service from the service provider that the person desires and could receive with an individual antenna; (2) the quality of the signal is as good as, or better than, the quality the person could receive or transmit with an individual antenna; (3) the costs associated with the use of the central antenna are not greater than the cost of installation, maintenance and use of an individual antenna; and (4) the requirement to use the central antenna does not unreasonably delay a person's ability to receive fixed wireless service.<sup>27</sup> If any element of the foregoing is missing, the central antenna exception is not available.

Massport fails the first prong of the central antenna exception because Continental would not have the ability to do business with the service provider of its choice. Massport has determined with whom Continental and all other tenants at Logan Airport will do business. The OTARD rules were designed to promote two complementary federal objectives: (a) to ensure that consumers have access to a broad range of services, and (b) to foster full and fair competition among different types of services and service providers.<sup>28</sup> Subjecting Continental, its customers, its employees, and all other tenants at Logan Airport to a single service provider

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<sup>27</sup> *Order on Reconsideration*, 13 FCC Rcd at 18999 ¶ 88. This is the same “impairment” standard that is applied to any other antenna restriction (*i.e.*, cost, delay and quality of signal), except that the Commission imposed an additional requirement: the person wishing to use an individual antenna may receive service from a service provider of his choice as opposed to a service provider selected by the party imposing the restriction. *Id.* The Commission did not amend its rules to codify a specific “central antenna exception” because it concluded that the same standard of impairment can be applied to a restriction based on the existence of a central antenna as it applied to any other antenna restriction. *Id.* ¶ 86.

<sup>28</sup> *See Report and Order*, 11 FCC Rcd at 19281 ¶ 6 (“the [OTARD] rule is designed to ... foster full and fair competition”).

denies all of them the benefits of a competitive marketplace and would frustrate both objectives. Therefore, the central antenna exception is not available to Massport.

Massport also fails the third prong of the central antenna exception. As discussed in Section II, *supra*, regardless of whether the fee for using Massport's central antenna is based on the number of enplanements at Logan Airport or on the number of "hits," the costs associated with the use of the central antenna would be greater than the cost of continuing to maintain Continental's existing antenna. Massport may attempt to argue that cost is "not an issue" if they offer Internet access to Continental free-of-charge. But as outlined in greater detail in Section II, *supra*, such argument ignores the fact that Continental would not be able to select the service provider of its choice, thus making the central antenna exception unavailable to Massport. Moreover, it appears that Massport has offered the temporary, free-of-charge solution merely in an attempt to dissuade Continental from pursuing its Petition without Massport having to concede that the OTARD provisions are lawful.

Massport also fails the last prong of the central antenna exception. As also discussed in Section II, *supra*, Massport's requirement that Continental seek prior approval by preparing and filing a TAA form, would delay Continental's ability to receive fixed wireless services. Under the lease, Massport may deny a TAA application at its sole and absolute discretion, thus placing Continental's ability to place a wireless antenna at the mercy of Massport's administrative procedures. Because of the inherent delay in a prior approval process that Massport requires for the installation and operation of *any* communications device, including antennas for the provision of wireless Internet access within the Club premises, the central antenna exception is not available to Massport.

#### **IV. MASSPORT’S RESTRICTIONS DO NOT FALL WITHIN THE SAFETY EXCEPTION TO THE OTARD RULES.**

Massport now also claims that Continental’s antenna has “interfered with wireless devices outside of Continental’s club room” and that such interference presents “an unacceptable *potential risk* to the effectiveness or accessibility of any ... communications system, key card access system ... and other system ....”<sup>29</sup> Furthermore, Massport states that “there are various safety and security wireless applications currently deployed over the Wi-Fi backbone throughout the terminal area of Logan Airport, including critical public safety communications by the State Police, the Transportation Security Administration, and the Authority,” and that “given the potential threat to public safety caused by Continental’s unauthorized and unlawful wireless communications, the [FCC] regulations would permit Massport to require Continental to remove its antenna and stop providing fixed wireless service.”<sup>30</sup> However, Massport’s generalized statement fails to set forth the specific safety objectives of its restrictions and does not specify how its restrictions accomplish its objectives.

The OTARD rules provide an exception for “legitimate safety goals ... that serve a stated safety purpose.”<sup>31</sup> In order to satisfy this safety exception, the proponent of the restriction has the burden of demonstrating that the restriction satisfies four elements:

1. The legitimate safety objective of the restriction must be clearly defined;
2. The restriction must be necessary to accomplish the safety objective;
3. The restriction must be “no more burdensome to affected antenna users than is necessary to achieve” the defined safety objective; and

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<sup>29</sup> *July 5, 2005 Letter* at p. 2 (emphasis added).

<sup>30</sup> *Id.*

<sup>31</sup> 47 C.F.R. § 1.4000(b)(1); *Report and Order*, 11 FCC Rcd at 19290 ¶ 24.

4. The restriction must not be discriminatory and should be “applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size and weight and pose a similar or greater safety risk as these antennas and to which local regulation would normally apply.”<sup>32</sup>

Furthermore, the legitimate safety objective must be either stated in the text, preamble or legislative history of the restriction, or a separate document that is readily available to affected antenna users. The definition must set forth the specific type of safety concern that the restriction is intended to address. As demonstrated below, Massport has not met its burden to satisfy the safety exception.

Massport’s assertion that Continental’s antenna represents a potential threat to public safety is a general statement rather than a “clearly defined, legitimate safety objective.” Massport fails to specify what impact, if any, Continental’s antenna has on the various safety and security wireless applications deployed over Logan’s Wi-Fi backbone.<sup>33</sup> In *Star Lambert*, which held that a city ordinance imposing restrictions on the installation and placement of video programming antennas did not qualify for the safety exception, the Commission determined that a general statement of “health, safety and welfare interests” did not provide the type of specific

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<sup>32</sup> 47 C.F.R. §§ 1.4000(b)(1), (b)(3).

<sup>33</sup> At a meeting in Boston on August 17, 2005 initiated by Massport, the Authority stated its concern that use of Wi-Fi systems at Logan Airport (other than the Massport system) could cause harmful interference to the Transportation Security Administration’s (TSA) and the Massachusetts State Police’s unlicensed radio systems and, therefore, operation of non-Massport Wi-Fi systems could not be tolerated. No instance of interference from any non-Massport system to the TSA or the State Police systems was reported and, presumably, has never occurred. As the Commission is aware, the unlicensed bands are shared bands and Part 15 devices that operate in those bands do not have priority over any other user in the band. If the State Police and TSA users of those bands want priority over other users in the band, they should deploy their systems in the public safety or other licensed bands and not in the unlicensed bands where they are obligated by FCC rules to accept interference from every other user in the band. Were the Commission to agree with Massport’s position on this issue, it would be agreeing to a seminal realignment of the hierarchy of users in the Part 15 bands without the benefit of the notice and comment process required by the Administrative Procedures Act and acting in complete derogation of the expectations that millions of Americans have about how they may use the millions of Part 15 devices in their homes and businesses. This assertion of a potential threat to public safety is not a “clearly defined, legitimate safety objective” that would bring Massport’s restriction within the ambit of the safety exception in the OTARD rules and is contrary to the explicit provisions of the Part 15 rules regarding radio frequency interference.



guidance and clear purpose that is required by the OTARD rules.<sup>34</sup> In particular, the Commission stated that the city did not sufficiently identify the type of safety concern it intended to address, and expressed concern that the general statement of safety interests was so broad and ill-defined that it constituted little more than a pro forma recitation.<sup>35</sup> Like the proponent of the safety exception in *Star Lambert*, Massport has failed to provide any basis to conclude that its restrictions are necessary to accomplish a clearly defined safety objective. The OTARD rules are specific with respect to the showing that Massport must make in order to avail itself of the safety exception. Since Massport has not met even the threshold requirement under the rule (stating a clearly defined legitimate safety objective), Massport cannot avail itself of the safety exception.

Furthermore, the timing of Massport's safety argument makes the claim suspect. Continental has been providing its Club members with wireless Internet access since July 2004. The first time that Massport demanded that Continental remove the antenna from the Club premises was via letter dated June 10, 2005. At that time, Massport did not express any concern about a potential threat to public safety. In response to Massport's June 10 letter, Continental stated that Massport's demand to remove the antenna was in violation of the OTARD rules. It was not until July 5, 2005, after Continental raised the consumer protection benefits afforded by

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<sup>34</sup> *Star Lambert*, 12 FCC Rcd at 10469 ¶ 36; see also *In re Victor Frankfurt*, DA 01-153, Memorandum Opinion and Order, 16 FCC Rcd 2875 ¶ 30 (2001) (restriction enacted in the "interest of promoting the safety and welfare" is a general statement of safety that fails to set forth the specific safety objectives); *In re Michael J. MacDonald*, CSR 4922-O, Memorandum Opinion and Order, 13 FCC Rcd 4844, 4851 ¶ 24 (CSB 1997) (a "passing reference to safety" did not articulate a safety objective which required that the restrictions at issue be imposed).

<sup>35</sup> *Star Lambert*, 12 FCC Rcd at 10469 ¶ 36.

the OTARD rules, that Massport first stated that there was a “potential threat to public safety.” The timing of Massport’s safety claim renders the legitimacy of its allegation, at best, suspect.<sup>36</sup>

As the sworn affidavit of Robert Edward in support of the Petition states, Continental was advised orally sometime in the spring of 2005 that its wireless system was allowing some customers at Logan Airport access to Continental’s free wireless service when standing outside the Club. As a result of that complaint, Continental lowered the power on its transmitter. Aside from that incident, and until Massport’s July 5, 2005 letter, Continental is not aware of any other complaint regarding the use of its antenna, and no complaint alleging interference with any safety and security wireless application at Logan Airport has been filed.

Finally, as Continental stated in its Petition, the Federal Aviation Administration (FAA), which regulates aviation safety, has not found the installation or operation of Continental’s antenna at Logan or any other airport to be unsafe. Continental’s first concern as an airline is the safety of its passengers, employees and the public, and as such, Continental takes exception to Massport’s implications that Continental is operating a wireless antenna that might compromise the safety of the flying public.

## **V. CONCLUSION**

Massport has attempted to characterize this matter as merely a disagreement between private parties and, therefore, one in which the Commission need not be involved.<sup>37</sup> Continental

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<sup>36</sup> See *Order on Reconsideration*, 13 FCC Rcd at 18969 ¶ 10 (stating that if “real estate developers add ‘safety boilerplate’ to restrictive covenants for anticompetitive reasons, the Commission will weight this factor heavily in determining whether the restriction is necessary, nondiscriminatory, and no more burdensome than necessary to accomplish the objective.”) (footnote omitted). It should be noted that Massport appears to have granted AWG a monopoly over the provision of Wi-Fi services at Logan Airport. See AWG’s website at <http://www.awgwifi.com> (last visited on August 15, 2005), stating that, “Massport may extend the Wi-Fi service to encompass all of the Massport property, including, the USS Constitution Marina, the East Boston Waterfront, and the South Boston Complex that includes the Boston World Trade Center” and that “AWG intends to actively pursue Wi-Fi network deployments in airports and other high traffic commercial venues where the benefits of Wi-Fi network access combined with sponsorship and advertising can be fully realized.”

disputes that characterization and asserts that this matter raises significant public policy issues for the flying public and all airport tenants at Logan Airport – and possibly at other multiple tenant environments across the United States – with regard to the Commission’s OTARD rules and its recently issued Policy Statement regarding preservation and promotion of the interconnected nature of public Internet. Much more is at stake than the interpretation of restrictions in a lease and it is in the public interest that the Commission resolve the public policy issues presented promptly.

Continental has demonstrated that Massport’s restrictions impair Continental’s ability to install, maintain and use a fixed wireless antenna to provide Club members with free wireless Internet access in violation of the OTARD rules and the Commission’s policies. It has also demonstrated that Massport’s restrictions do not fall within the central antenna or safety exceptions. For these reasons, Continental respectfully requests that the Commission provide the relief requested in Continental’s Petition.

Respectfully submitted,

**CONTINENTAL AIRLINES, INC.**

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Dated: September 28, 2005

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<sup>37</sup> Massachusetts Port Authority, Motion for Extension of Time, ET Docket No. 05-247, filed August 16, 2005.

## CERTIFICATE OF SERVICE

I, Diana M. Gonzales, Executive Legal Secretary at Vinson & Elkins, LLP, do hereby certify that on this 28th day of September 2005, a copy of the foregoing **“Comments of Continental Airlines, Inc.”** was sent via first-class mail, postage paid, except as otherwise noted, to the following:

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